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No. _____

In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under well-established rules of agency law, an owner or corporate officer will not be held vicariously liable for the torts of his corporation or its other agents, merely by virtue of his office. Rather, liability must be founded upon the owner's or officer's own specific acts.

The question presented here is whether, as held by the Ninth Circuit, the criteria under the Fair Housing Act (42 U.S.C. § 3601, *et seq.*) are different, so that owners and officers of corporations are absolutely liable for an employee's or agent's violation of the Act, whether or not they personally directed, authorized, or were even aware of the particular acts that occurred.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding are petitioner David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors, and respondents Emma Mary Ellen Holley; David Holley; Michael Holley, a minor; Brooks Bauer, individually and on behalf of the general public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Meyer, individually, and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors ("petitioner"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case filed on July 31, 2001.

OPINION BELOW

The district court's orders granting in part petitioner's motion to dismiss and granting petitioner's motion for summary judgment are not published. These unpublished orders are reprinted in the Appendix to this Petition at pages 17-36. The court of appeals' opinion (per Hug, J., joined by Fletcher and Illston, JJ.) reversing is published at 258 F.3d 1127 (9th Cir. 2001), and is reprinted in the Appendix at pages 1-16. The court of appeals' orders denying rehearing and rehearing en banc and staying mandate are set forth in the Appendix. Appendix at 37-40.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on July 31, 2001. A petition for rehearing and rehearing en banc was timely filed, and denied on September 19, 2001. Justice O'Connor subsequently extended the time to file this petition to and including February 1, 2002.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

1. The Fair Housing Act of 1968 (FHA), 42 U.S.C. § 3601, *et seq.* The relevant provisions of this statute – §§ 3610, 3612, and 3613 – are reprinted in the Appendix at 41-61.

2. Former 24 C.F.R. § 103.10-20 (1999). Appendix at 62-63.

3. Current 24 C.F.R. § 103.10-20 (2000). Appendix at 64.

STATEMENT OF THE CASE[1]

Respondent Emma Mary Ellen Holley is African-American, her husband Respondent David Holley, is Caucasian, and their son, Respondent Michael Holley is African-American. According to the allegations of their complaint, in October 1996, the Holleys visited Triad Realty's office in Twenty-Nine Palms, California where they met with Triad agent Grove Crank and inquired about listings for new houses in the range of $100,000 to

[1] This appeal arose following the granting in part of Meyer's motion to dismiss. Appendix at 17-28. For the purpose of reviewing a motion to dismiss, the properly pled factual allegations of the plaintiff's complaint are presumed to be true. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

$150,000. The Holleys alleged that Crank showed them four houses in the area, all priced above $150,000.

In mid-November 1996, the Holleys located a home on their own that happened to be listed by Triad. In response to the Holleys' inquiry about the home, Triad agent Terry Stump informed them that the asking price for the house was $145,000. The Holleys expressed interest in purchasing the home and offered to pay the asking price and to put $5,000 in escrow for the builder to hold the house until April or May 1997 when they were to close escrow on the sale of their current home.

Stump allegedly told the Holleys that their offer seemed fair, as did the builder, Respondent Brooks Bauer, when Mrs. Holley called him with the same offer. Bauer did advise, however, that the offer would have to go through Triad. Later, Stump allegedly called Mrs. Holley to tell her that more experienced agents in Triad's office, one of whom was later identified as Crank, felt that $5,000 was insufficient to get the builder to hold the house for six months. The Holleys decided not to raise their offer and Triad never presented the original offer to Bauer. One week later, Bauer inquired at Triad about the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys, telling Bauer that he did not want to deal with those "n" and called them a "salt and pepper team." The Holleys eventually hired a builder to construct a house for them and Bauer later sold his house for approximately $20,000 less than the Holleys had offered.

Bauer and the Holleys filed a complaint on November 14, 1997, alleging that Crank and Triad violated federal and state fair housing laws. They later filed a separate action against Petitioner David Meyer as officer/broker, president and owner of Triad, covering the same allegations and adding several new claims. The district court consolidated the two cases.

The district judge, ruling on a Federal Rule of Civil Procedure 12(b)(6) motion, dismissed all of the claims except the FHA claim, on the grounds that they were barred by the applicable statutes of limitation. Respondents did not appeal this ruling. With regard to the FHA claim, the district court granted the motion to dismiss Meyer in his capacity as an officer of Triad stating that any such liability would attach to Triad in that Respondents had not urged theories that would justify reaching Meyer individually.

Meyer then moved for summary judgment on the FHA claim. The district court granted Meyer summary judgment on that claim, finding that, during the relevant time, the real estate license was issued to Triad, with Meyer as the designated corporate officer of Triad. Thus, the district court concluded that Crank's alleged discriminatory acts could be imputed to Triad, but not to Meyer as an individual. The district court entered a rule 54(b) certification of that judgment as final to allow this appeal, and stayed all remaining proceedings against Triad and Crank.

The court of appeals reversed. The court held that Meyer could be held vicariously liable for Crank's conduct based on his status as the purported owner and

president of Triad, and as the corporation's designated officer/broker. Appendix at 1-16. The court of appeals denied Meyer's petition for rehearing and rehearing en banc. Appendix at 39-40. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

In its published decision, the Court of Appeals for the Ninth Circuit held that the owners and officers of corporations may be vicariously liable for an employee's violation of the Fair Housing Act (42 U.S.C. § 3601, *et seq.*; "FHA"), whether or not they directed, authorized, or even were aware of the particular acts that occurred. While acknowledging that under general rules of tort law, corporate shareholders and officers usually are not held vicariously liable for an employee's action, the court of appeals held that the criteria under the FHA are different, with liability adhering to "those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling." 258 F.3d 1129.

Certiorari should be granted because this case presents an issue to which Sup.Ct.R. 10(c) applies, i.e., the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, namely whether the FHA abrogates established rules of vicarious liability. The court of appeals' conclusion that it does is premised on an erroneous application of the law, which conflicts with other circuits.

First, the court of appeals' decision incorrectly relies on the text of a regulation of the Department of Housing and Urban Development ("HUD") because that regulation had been superceded by new text, and also because that regulation concerns the investigation and conciliation of administrative complaints, rather than private civil litigation. 258 F.3d at 1130-31. That regulation provided, in part, that a "complaint" may be filed against any person who "has the right to direct or control the conduct of another person" with respect to any aspect of the sale of dwellings. Former 24 C.F.R. § 103.20 (1999); Appendix at 63. The court of appeals' elevation of an administrative regulation – which no longer existed at the time the court of appeals relied upon it – to the level of controlling law was error.

The text of Section 103.20, in the form relied on by the court of appeals, had already been rewritten, and no longer makes any reference to claims against persons with the right to direct or control. The current regulation existing at the time the court of appeal issued its opinion merely states that individuals can notify HUD if they believe there has been discrimination against them in any activity related to housing. 24 C.F.R. § 103.10-20 (2000); Appendix at 63-64. Thus, the authority upon which the court of appeals relied effectively created new law by fiat.

Moreover, the court of appeals' decision fails to address, and directly conflicts with, authority from other circuits holding that HUD regulations do *not* cover the circumstances of the present case, which is a private cause of action and not a complaint filed with HUD. See, *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992). Finally, even if this Court were to look to HUD's administrative

regulations for guidance, nothing in the language of the regulations supports a conclusion that ordinary principles of agency are to be displaced in favor of absolute liability. *Id.*, at 905-06.

Second, the court of appeals relied on case law from the Ninth Circuit and other circuits holding that the duty not to discriminate is "nondelegable." 258 F.3d at 1131-32; see, *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir. 1980) (action under 42 U.S.C. § 1982); *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974). The court of appeals misapplied this legal principle. The nondelegable duty not to discriminate does not change the law of vicarious liability. The court of appeals' decision fails to address the authority from other circuits on point, which has expressly held that vicarious liability for an agent's violation of the FHA attaches to the corporation under whose broker's license the agent was operating. No liability attaches to the officers of the corporation, unless the officer personally participated in the agent's acts, or knew of and ratified his acts and statements, and the nondelegation principle simply does not apply to hold otherwise. See, e.g., *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232 (N.D. Ohio 1983); *United States v. Lorantffy Care Center*, 999 F.Supp. 1037 (N.D. Ohio 1998). In the present case, there is no allegation or evidence Meyer participated in, or knew of and ratified, the alleged discriminatory acts of the corporation's agent, Crank. Rather, in contravention of the authority in other circuits, the court of appeals held Meyer could be personally liable based solely on his status as the owner or officer of the corporation.

Third, the court of appeals believed its expansion of liability was warranted by the policy underlying the FHA to provide a remedy to those who are the victims of discrimination. 258 F.3d at 1132-33; see, *Walker v. Crigler*, *supra*, 976 F.2d at 904. The court of appeals' belief is not well-founded. The plaintiffs in this action are not without a remedy against the agent who allegedly violated the FHA, as well as his principal, the corporation. No further purpose is served by allowing plaintiffs to proceed personally against an innocent officer of the corporation who neither participated in, nor authorized or ratified, the agent's conduct. Such a quest for an imagined "deep pocket" is repugnant to, and in no way furthers, the actual and laudable policy underlying the FHA.

Fourth, review of the court of appeals' decision is necessary and appropriate due to the exceptional impact of this case. The court of appeals' published opinion has already attracted the attention of state and national media, demonstrating recognition that the ramifications of the decision extend far beyond the catastrophic consequences to Meyer. By holding that the officer of a corporation can be absolutely liable for the conduct of the corporation's agent, whether or not the officer directed, or authorized or knew of the particular discriminatory act, the court of appeals' decision has, without exaggeration, opened the floodgates of litigation throughout the country. Such a holding warrants further scrutiny before becoming the law.

LEGAL DISCUSSION

I.

THE COURT OF APPEALS IMPROPERLY RELIED ON AN ADMINISTRATIVE REGULATION THAT IS INAPPLICABLE IN THE CONTEXT OF THIS CASE.

In reaching its conclusion that the criteria for liability under the FHA are different than under general principles of tort law, the court of appeals did not rely on the FHA itself, which neither defines – nor expands – the class of persons who can be sued for alleged discriminatory housing practices. Rather, the court of appeals relied on HUD regulations for the investigation and conciliation of administrative complaints. Specifically, the court of appeals relied on *former* 24 C.F.R. section 103.20(b) (1999) which provided, in relevant part:

> "A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale . . . of dwellings or the provision of brokerage services relating to the sale . . . of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, or is about to engage, in a discriminatory housing practice." Appendix at 63.

Section 103.20, however, is no longer in effect. The regulation was replaced and completely rewritten prior to the court of appeals' decision to read in relevant part:

> **"What can I do if I believe someone is discriminating against me in the sale, rental, finance, or advertisement of housing?**

> You can notify HUD if you believe there has been discrimination against you in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household." 24 C.F.R. § 103.10 (2000), original bold; see also, 24 C.F.R. §§ 103.15-20. Appendix at 64.

The court of appeals acknowledged this change in HUD regulations, but summarily dismissed it as merely making the provision more "user-friendly." 258 F.3d at 1131, fn. 1. That, however, is not what HUD did. The new regulations completely abolished any reference to liability of "any person" with "the right to direct or control the conduct of another person" with respect to housing, and in so doing eliminated the very language relied on by the court of appeals to support its decision. HUD's elimination of this language from the regulations cannot be summarily dismissed as merely an attempt to make the regulations "user-friendly."

Second, even if this Court were to look to the former HUD regulation for guidance, the court of appeals' elevation of the regulations to the level of controlling law was improper. HUD regulations expressly apply only to administrative complaints. They do not cover civil actions, nor purport to expand civil liability. 24 C.F.R. § 103.1.[2] The court of appeals' decision fails to address

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[2] Former 24 C.F.R. section 103.1 provided in relevant part:

> "(a) This part contains the procedures established by the Department of Housing and Urban Development for the investigation and conciliation of complaints under section 810 of the Fair Housing Act, 42 U.S.C. § 3610."

and directly conflicts with the authority from other circuits, which has expressly held that these regulations "do not cover the circumstances of the present case which is a private cause of action and not a complaint filed with HUD." *Walker v. Crigler, supra,* 976 F.2d at 904 (interpreting former Section 103.20).

Third, the court of appeals overlooked the history of the promulgation of former Section 103.20, which demonstrates that HUD in no way intended to impose strict vicarious liability upon innocent owners and corporate officers. See, *Walker v. Crigler, supra,* 976 F.2d at 905-06 (HUD "has made clear that ordinary principles of agency law are not to be displaced in favor of strict liability"). HUD first addressed the issue in 1984, when it published a proposed section entitled "Persons against whom complaints may be filed." Subdivision (b) of this proposed section was substantially identical to the language subsequently used in Section 103.20, *except* that it omitted the requirement that the agent be acting in the scope of employment. 49 Fed. Reg. 40533 (proposed Oct. 16, 1984); see, *Walker v. Crigler, supra,* 976 F.2d at 906.

In response to concerns that the regulation could be interpreted as imposing strict liability on owners and corporate officers for the unlawful acts of their agents, HUD's comments accompanying the publication of the final version of the rule – which was the version relied on by the court of appeals – makes clear this was not HUD's intent. According to HUD,

> "NAR [National Association of Realtors®] contended that the judicial decisions do not establish a rule of absolute liability (without fault) as paragraph (b) would impose. NAR argued that

> the decided cases focus only on the liability of a broker for conduct of his or her salespersons, but do not mandate absolute liability on the basis of mere right 'to direct or control' without reference to instructions, policies, compliance programs and other actions of the principal. . . . In response, ***it is not HUD's intent to impose absolute liability on any principal***; the intent, in proposing paragraph (b), was to follow the law enunciated by the courts in recent Fair Housing Act cases with respect to liability of a principal for acts of an agent. . . . " *Walker v. Crigler, supra*, 976 F.2d at 907, citing 53 Fed. Reg. 24185 (1988), added emphasis; see also, 54 Fed. Reg. 3260-61 (1989).

Thus, HUD's comments confirm the most straightforward reading of the text of former Section 103.20: established principles of agency law, and not strict liability, control a principal's liability under the FHA for the acts of an agent. See, *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992) (principals may be held liable for the conduct of their agents in violation of the FHA under established rules of agency).

II.

THE COURT OF APPEALS MISAPPLIED THE PRINCIPLE OF "NONDELEGABLE" DUTY BY HOLDING IT SUPERCEDES ESTABLISHED RULES OF AGENCY LAW.

Under well-established rules of agency law, a corporate officer will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation or its other agents. Rather, liability must be founded upon specific acts by the individual officer. See, *Lobato v. Pay-*

Less Drug Stores, 261 F.2d 406, 409 (10th Cir. 1958); *Tillman v. Wheaton-Haven Recreation Association*, 517 F.2d 1141, 1144 (4th Cir. 1975); *Escudo Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980); *Murphy Tugboat v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 852 (N.D. Cal. 1979), aff'd, 658 F.2d 1256, 1263 (9th Cir. 1981); see also, 18B Am.Jur.2d, Corporations, §§ 1877-78.

This fundamental principle of agency and corporation law has been applied regularly to claims brought under the FHA, and those courts which have expressly considered the issue in this context have underscored the need for the officer's personal participation in torts committed by the corporation or its agents in order for liability to be imposed on the owner or officer. *Tillman v. Wheaton-Haven Recreation Ass'n., supra*, 517 F.2d at 1144; *United States v. Lorantffy Care Center, supra*, 999 F.Supp. at 1045; *Heights Community Congress v. Hilltop Realty, Inc., supra*, 629 F.Supp. at 1303-04.

The court of appeals' decision overlooked this authority. Instead, the court of appeals relied on authority from the Ninth Circuit and other circuits that the duty not to discriminate is "nondelegable." The court of appeals concluded this principle of law was sufficient to override established agency law, and impose vicarious liability on corporate owners and officers for a sales agent's violation of the FHA, whether or not the owners or officers directed, authorized, ratified, or even knew of the particular acts that occurred. The court of appeals has misapplied the law in a fundamentally significant manner that requires correction by this Court.

The court of appeals relied extensively on *Phiffer v. Proud Parrot Motor Hotel, Inc., supra,* 648 F.2d at 548. *Phiffer* was a case under 42 U.S.C. section 1982, not the FHA, based on a rental agent's alleged discriminatory refusal to rent office space in a commercial hotel.[3] 648 F.2d at 550-51. The Ninth Circuit found the discriminatory conduct of the rental agent was imputable to the owner of the commercial hotel under the nondelegable duty not to discriminate. "Discriminatory conduct on the part of a rental agent is, however, attributable to the owner of a motel, apartment complex, or other public housing facility. [Citations.] The duty of the owner of such a facility to obey the laws relating to racial discrimination is non-delegable." *Id.*, at 551.

It is, however, important to note that in reaching its conclusion to affirm, the Ninth Circuit pointed out that "the magistrate found that the desk clerk's actions reflected the established policy of the Proud Parrot." 648 F.2d at 551. Thus, the owner affirmatively participated in the discriminatory conduct of its agents by establishing a discriminatory policy for the business. Accordingly, nothing in the facts or holding of *Phiffer* supports the court of

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[3] To the extent *Phiffer* can be read as expanding liability under Section 1982 on the basis of a nondelegable duty, it is in direct conflict with the law in the Fourth Circuit. See, *Tillman v. Wheaton-Haven Recreation Association, Inc., supra,* 517 F.2d at 1144 ("[Section] 1982 should be interpreted as neither enlarging nor diminishing the liability of directors under general corporation law for tortious acts performed nominally by the corporation").

appeals' conclusion here that, under the principle of nondelegable duty, the officer of a corporation can be vicariously liable under the FHA for the acts of an agent, whether or not the officer directed or authorized the acts which occurred.

Thus, while there is a nondelegable duty not to discriminate, that principle applies to preclude a principal to whom a legal duty applies (here, the duty not to discriminate) from attempting to evade that duty when an agent, rather than the principal, performs conduct to which the law applies. That principle does not apply to the quite distinct question of whether corporate officers or owners to whom the FHA does not by its terms apply at all are liable for the misconduct of the corporation and its agents. Nondelegation does not transform a determination of an owner's or officer's liability from established rules of agency to strict liability. Indeed, in distinct contrast to the holding of the court of appeals here, the proper limit of the nondelegable duty concept was expressly recognized by the court in *Hilltop,* where on that basis the court found *only the corporation* liable for the discriminatory acts and statements of its agents. 629 F.Supp. at 211-13 ("A broker under contract with its agents has a nondelegable duty to obey the Fair Housing Act. [Citation.] Thus, Hilltop Realty is liable for the imputed acts and statements of those agents who participated in the [violations of the FHA]").

In sum, while there is a nondelegable duty not to discriminate, the court of appeals misapplied that principle by holding it superseded established rules of agency law.

III.

THE COURT OF APPEALS' EXPANSION OF LIABILITY IS NOT WARRANTED BY THE POLICY UNDERLYING THE FHA TO PREVENT DISCRIMINATION IN HOUSING.

The declared policy of the FHA is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Fourth Circuit elaborated on this policy as follows:

> "The central question to be decided in a case such as this . . . is which innocent party, the owner whose agent acted contrary to instruction, or the potential renter who felt the direct harm of the agent's discriminatory failure to offer the residence for rent, will ultimately bear the burden of the harm caused. It is clear that the overriding societal priority of the provision 'fair housing throughout the United States' clearly set out in the Fair Housing Act, indicates that the one innocent party with the power to control the acts of the agent, the owner of the property or other responsible superior, must act to compensate the injured party for the harm, and to ensure that similar harm will not occur in the future." *Walker v. Crigler, supra*, 976 F.2d at 904-05; accord, *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096-97 (7th Cir. 1992).

The court of appeals seized on this language as providing the policy justification for its holding that the owners and officers of corporations may be vicariously liable for an employee's violation of the FHA, whether or not the owners or officers directed or authorized the

particular acts that occurred. 258 F.3d at 1131-32. It does not.

The plaintiffs in this action are not without recourse. They can pursue their action against the agent who is directly responsible for the alleged discrimination, as well as against the "one innocent party with the power to control the acts of the agent," i.e., the corporation. No legitimate policy is furthered by allowing plaintiffs to pursue an innocent corporate officer/owner as well. Indeed, plaintiffs' motivation for pursuing this case against Meyer is transparent. Plaintiffs apparently believe that, because the corporation's insurance policy excludes coverage for discrimination claims, they have been left without a remedy. Plaintiffs' contention that they should be allowed to proceed against Meyer because he is an imagined "deep pocket" is repugnant, and in no way furthers the actual laudable policy underlying the FHA.

IV.

THE ISSUE PRESENTED BY THIS CASE IS OF NATIONAL IMPORTANCE.

Review by this Court of the court of appeals' decision is necessary and appropriate due to the exceptional importance of this case. The court of appeals' decision has already attracted the attention of state and national media, as well as the California and National Associations of Realtors®, demonstrating that the ramifications of the decision extend far beyond the catastrophic consequences to Meyer.

While this case involves a small real estate company in a small desert town with perhaps five sales agents, the

same corporate structure governs many real estate firms, from tiny "Mom and Pop" operations to corporate real estate giants that may hire thousands of agents nationwide. Now, under the court of appeals' decision, each owner and officer of these corporations is going to be *personally* liable for the acts of all of those agents. What sane individual would take on that responsibility? Yet without officers and owners, none of these real estate corporations could continue to function. Indeed, the impact of the court of appeals' decision goes beyond the real estate industry, encompassing as it does the officers of *any* corporation providing services related to the purchase and sale of residential real estate.

By holding a corporate owner or officer personally liable for the conduct of the corporation's agent, whether or not the individual directed or authorized the particular discriminatory act, the court of appeals' decision has, without exaggeration, opened the floodgates of litigation throughout the country. Such a holding warrants further scrutiny by this Court before becoming the law of the nation.

CONCLUSION

For the foregoing reasons, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

Dated: January 28, 2002

Respectfully submitted,

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Attorneys for Petitioner, David Meyer, individually and in his capacity as president and designated officer/broker of Triad, Inc., dba Triad Realtors.

United States Court of Appeals,
Ninth Circuit.

Emma Mary Ellen HOLLEY; David Holley; Michael Holley, a minor; Brooks Bauer, individually and on behalf of the general public, Plaintiffs-Appellants,

v.

Grove S. CRANK, Sr., individually, dba Triad Realtors; Triad Inc., individually, dba Triad Realtors Defendants,

and

David Meyer, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors, Defendant-Appellee.

No. 99-56611.

Argued and Submitted March 5, 2001
Filed July 31, 2001

Elizabeth N. Brancart, Brancart & Brancart, Pescadero, California, for the appellants.

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Appeal from the United States District Court for the Central District of California; William Matthew Byrne, Jr., Senior District Judge, Presiding. D.C. Nos. CV-98-07965-WMB-HX, CV-97-08369-WMB-SHX.

Before: HUG, AND B. FLETCHER, CIRCUIT JUDGES, and ILLSTON, District Judge.*

HUG, Circuit Judge:

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* Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

In this case we must decide whether owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act (FHA). We conclude that they can. Although under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act is different as liability is specified for those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling. The decision of the district court is reversed.

BACKGROUND

Emma Mary Ellen Holley is African American, her husband David Holley, is Caucasian and their son, Michael Holley is African American. The Holleys allege that in October 1996, they visited Triad Realty's office in Twenty-Nine Palms, California where they met with Triad agent Grove Crank and inquired about listings for new houses in the range of $100,000 to $150,000. The Holleys allege that Crank showed them four houses in the area, all above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed by Triad. In response to the Holleys' inquiry about the home, Triad agent Terry Stump informed them that the asking price for the house was $145,000. The Holleys expressed interest in purchasing the home and offered to pay the asking price and to put $5,000 in escrow for the builder to hold the house until April or May 1997 when they closed escrow on their existing home.

Stump told the Holleys that their offer seemed fair, as did the builder, Brooks Bauer, when Mrs. Holley called him with the same offer. Bauer did express, however, that the offer would have to go through Triad. Later, Stump called Mrs. Holley to tell her that more experienced agents in the office, one of whom was later identified as Grove Crank, felt that $5,000 was insufficient to get the builder to hold the house for six months. The Holleys decided not to raise their offer and Triad never presented the original offer to Bauer. One week later, Bauer inquired at Triad about the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys, telling Bauer that he did not want to deal with those "n" and called them a "salt and pepper team." The Holleys eventually hired a builder to construct a house for them and Bauer later sold his house for approximately $20,000 less than the Holleys had offered.

Bauer and the Holleys filed a complaint on November 14, 1997, alleging that Crank and Triad violated federal and state fair housing laws. They later filed a separate action against David Meyer as officer/broker, president and owner of Triad, covering the same allegations and adding several new claims. The district court consolidated the two cases. The district judge, ruling on a Federal Rule of Civil Procedure 12(b)(6) motion, dismissed all of the claims except the FHA claim, on the grounds that they were barred by the applicable statutes of limitation. Plaintiffs have not appealed this ruling. With regard to the FHA claim, the district court granted the motion to dismiss Meyer in his capacity as an officer of Triad stating that any liability of Meyer as an officer of Triad would attach to Triad in that Plaintiffs have not

urged theories that would justify reaching Meyer individually. Meyer than [sic] moved for summary judgment on the remaining FHA claim. The district court granted Meyer summary judgment on that claim, finding that, during the relevant time, the real estate license was issued to Triad, with Meyer as the designated corporate officer of Triad. Thus, the district court concluded that Crank's discriminatory acts could be imputed to Triad, but not to Meyer as an individual. The district court entered a Rule 54(b) certification of that judgment as final to allow this appeal, and stayed all remaining proceedings against Triad and Crank.

ANALYSIS

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act of 1968 (FHA), broadly prohibits discrimination in housing. 42 U.S.C. § 3601 *et seq*. An examination of the Act reveals a "broad legislative plan to eliminate all traces of discrimination within the housing field." *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir.1974). The FHA itself, however, does not limit or define who can be sued for discriminatory housing practices. The Department of Housing and Urban Development (HUD), the federal agency primarily assigned to implement and administer Title VIII, has developed regulations and guidelines, which this Court affords considerable deference, interpreting when liability attaches under the FHA. *See Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir.1999). Historically, HUD's regulations for administrative complaints have provided, in relevant part:

> A complaint may also be filed against any person who directs or controls, *or has the right to direct or control, the conduct of another person* with respect to any aspect of the sale . . . of dwellings or the provision of brokerage services relating to the sale [ ] of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. § 103.20 (1999)[1] (emphasis added).

The FHA provides two means of enforcing its provisions. Under § 3610(a), a person "aggrieved" may file a complaint with HUD, and the agency investigates and resolves the complaint's charges. If the administrative agency is unable to obtain compliance or concludes that judicial action is necessary to carry out the purposes of the Act, a civil suit may be commenced. 42 U.S.C. §§ 3610(e) & (g); 3612. The alternate route for obtaining redress under the FHA is pursuant to § 3613, which provides the right to file suit in a federal or state court without awaiting action by HUD. Thus, the two sections

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[1] The current version of this regulation replaces this language with an apparently more user-friendly provision instructing that a person should notify HUD for assistance in filing a claim if they believe there has been discrimination against them in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household. 24 C.F.R. § 103.10-20. Absent any indication that HUD intended to narrow liability under the new regulations, we find the previous language instructive regarding the potential scope of liability.

provide parallel remedies for the same prospective plaintiffs and courts have analyzed the provisions as alternate analogous remedies. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 105-8, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (noting HUD's consistent treatment of the two provisions as alternative remedies to precisely the same prospective plaintiffs); *see also Marr v. Rife*, 503 F.2d at 739 (concluding that although the civil action provision fails to indicate the burden of proof to be applied, it would be anomalous for a different burden to apply under that section than is applied under § 3610). Accordingly, we look to HUD's relevant regulatory history for administrative complaints to help determine the scope of liability here.

The district court found that as a matter of law Meyer could not be vicariously liable based on his position as president and officer/broker of Triad. We disagree. Considering the relevant HUD regulation quoted above, Meyer bears potential liability in his capacity as owner, president and officer/broker of the corporation. Additionally, our Court has recognized that the duty to obey the laws relating to racial discrimination under the FHA is non-delegable. *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir.1980). Although officers and shareholders of a corporation generally enjoy immunity from liability for corporate acts, as a matter of furthering the compelling policy of the FHA and because this involves a non delegable duty, we conclude that a corporation and its officers may be held liable for their failure to ensure the corporation's compliance with the FHA, whether or not the officers directed or authorized the

particular discriminatory acts that occurred.[2] While we recognize that holding a corporation and its officers responsible even though the acts of subordinate employees were neither directed nor authorized seems harsh punishment of an otherwise innocent employer, we agree with our sister Circuits in finding that preferable to leaving the burden on the innocent victim who felt the direct harm of the discrimination. *See City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096-97 (7th Cir.1992); *Walker v. Crigler*, 976 F.2d 900, 904-905 (4th Cir.1992). The overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden. *See Walker*, 976 F.2d at 904.

Meyer's Liability as Sole Owner and Officer of Triad

The district court did not expressly address Meyer's liability as sole owner of Triad and Meyer maintains that Appellants did not sue Meyer as Triad's owner. The complaint against Meyer sued him for FHA violations in his individual capacity *and* as an officer and designated officer/broker of Triad. It does not appear that Meyer could be liable as an individual, as opposed to in his capacity as officer/broker and president of Triad, other than under a theory of vicarious liability as the owner of Triad, as there

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[2] Our decision applies only to vicarious liability for compensatory damages. We do not address vicarious liability for punitive damages as the issue is not before us.

is no allegation that he directly participated in the discrimination. Accordingly, we address his potential liability as sole owner of Triad for FHA violations of employees.

The duty to obey the laws relating to racial discrimination under the FHA is non-delegable. *Phiffer,* 648 F.2d at 552. In *Phiffer,* this court concluded that the owner of the Proud Parrot Motor Hotel Corporation was liable for the discriminatory conduct of his desk clerk even absent any evidence that the clerk acted under management's instruction. *Id.*[3] Although *Phiffer* involved an owner of a motel rather than a real estate corporation, the same rule is compelling here. Triad was directly and immediately involved in the sale of real estate involving the alleged violation. As the real estate agency that allegedly committed the unlawfully discriminatory acts in providing brokerage services for the sale of the property, Triad is connected to the discrimination even more directly than the hotel corporation owner in *Phiffer.* Our rule under *Phiffer* renders the sole owner of a corporation liable based on the non-delegable duty to obey the FHA and, thus, if Meyer owned Triad at the time of the discriminatory acts at issue, he cannot relinquish the responsibility for preventing such discrimination to another party. *Accord Walker v. Crigler,* 976 F.2d 900, 904 (4th Cir.1992).

[3] The court did note that the magistrate had found that the desk clerk's actions reflected established policy of the Proud Parrot. Still, the court's language regarding the non-delegable duty to follow the law is clear and instructive.

In so ruling, we follow the lead of other federal circuit courts. The Seventh Circuit held a realty corporation and its sole shareholder vicariously liable for compensatory damages resulting from individual sales agents' FHA violations even though the sole shareholder had specifically instructed the agents not to discriminate and had not personally joined in any discriminatory acts. *Matchmaker,* 982 F.2d at 1096-98. Noting *Walker*'s policy discussion, the Seventh Circuit agreed with the Fourth Circuit that " 'we must hold those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law if the goal of equal housing opportunity is to be reached.' " *Id.* at 1096 (quoting *Walker,* 976 F.2d at 905). We also agree with this policy.

Matchmaker concluded that as the sole owner of the corporation, the chief executive officer and the supervisor of the day-to-day operations of the corporation and its agents, the defendant should be personally liable for compensatory damages. *Id.* at 1098. We adopt this reasoning and, thus, remand to the district court to allow the Holleys the opportunity to try the issue of Meyer's ownership of Triad at the time of the alleged violations.[4] We

[4] Meyer started Triad in 1974 and was the sole stockholder from 1978 until around February 1995 when he claims he transferred ownership to Crank. Meyer concedes, however, that there is no documentation reflecting this transfer and that he remained the president and designated officer/broker of the company until 1998. When asked about the circumstances of the transfer of ownership, Meyer described having conversations with Crank in which they decided Crank would carry on with the company, take over financial responsibility and day-to-day operations. The only "evidence" that this transfer of ownership occurred in 1995 is "Document 2000" – the minutes of a meeting

agree with the Seventh Circuit that a principal cannot free itself of liability by delegating to an agent the duty not to discriminate. *See id.* at 1096.[5]

While the evidence does not indicate that Crank acted with the approval or at the direction of Meyer, such a finding is not necessary to hold Meyer liable as the sole owner of Triad for breach of a non-delegable duty to comply with the FHA. *See Marr v. Rife*, 503 F.2d at 742. If Meyer solely owned the agency, he had at least the

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in April 1995 making Crank vice-president. Meyer claims that this assignment was associated with the transfer of ownership, despite Meyer remaining president of the company until 1998, and keeping an office there that he used daily until 1997.

The Holleys presented sufficient evidence to entitle them to a trial regarding Meyer's liability as owner of Triad at the time of the alleged discrimination. Appellants also allege that Triad pays its taxes under Meyer's identification number. Furthermore, Meyer executed Crank's renewal of salesperson's license in March 1998 indicating Meyer was the employing broker. At the very least under these circumstances, the alleged undocumented transfer of the corporation is questionable as there would seem to be legal, financial and tax consequences to such a transfer yet there is no explanation or documentation as to how anything was carried out. As such, the issue is one of credibility and fact. Accordingly, we remand to the district court to determine whether Meyer owned Triad during the time at issue and is therefore liable for the agent's discriminatory acts.

[5] The Sixth Circuit also held that a real estate agency owner should be vicariously liable for compensatory damages resulting from salespersons' FHA violations even though there was no evidence that the agent acted with the approval or at the direction of the owner. The court reasoned that the owner of the agency had at least the power to control the acts of his salespersons. *Marr v. Rife*, 503 F.2d 735, 742 (6th Cir.1974).

authority to control the acts of his salespersons, particularly in light of his position as president and officer/broker of Triad. As discussed above, this is enough, under the approach we adopt here and that adopted by a number of courts, to hold Meyer personally liable. *Id.; Matchmaker*, 982 F.2d 1086; *Walker*, 976 F.2d 900; *Northside Realty Assoc. Inc. v. United States*, 605 F.2d 1348, 1354 (5th Cir.1979); *United States v. Tropic Seas, Inc.*, 887 F.Supp. 1347, 1365 (D.Haw.1995); *United States v. Youritan Constr. Co.*, 370 F.Supp. 643, 649 (N.D.Cal.1973), modified as to relief and aff'd, 509 F.2d 623 (9th Cir.1975).

The same reasoning compels Meyer's potential liability in his capacity as president of the corporation. Perhaps more so than in his capacity as sole owner of the company, as an officer of the company he actually did direct or control, or had the right to direct or control, the conduct of the salespersons who allegedly discriminated against the Holleys with respect to the sale of real estate. While we recognize that corporate officers and shareholders are generally shielded from personal liability, we agree with the Seventh Circuit that "where common ownership and management exists, corporate formalities must not be rigidly adhered to when inquiry is made of civil rights violations." *Matchmaker*, 982 F.2d at 1098. Thus, under relevant HUD regulatory history, and because the duty not to discriminate is a non-delegable one, we join other courts in holding that officers can be individually liable for discriminatory acts of corporate employees under their management and control. *See e.g., Tropic Seas*, 887 F.Supp. at 1365; *Northside*, 605 F.2d at 1354 (holding president and vice-president of real estate corporation accountable for discriminatory acts of their

agents, "whether or not the officers directed or authorized the particular discriminatory acts that occurred").

Our decision recognizes the duty under the FHA as non-delegable, furthering the purposes of the FHA. Moreover, as discussed below, Meyer may have neglected his duties to supervise salespeople in their real estate transactions, which included his responsibility to ensure that they follow federal and state anti-discrimination laws.

Meyer's Responsibilities as Designated Officer/Broker of Triad

As designated officer/broker of the company, Meyer was responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees in the performance of acts for which a real estate license is required. Cal. Bus. & Prof.Code § 10159.2(a). Under California law, a real estate broker is required to exercise reasonable supervision over the activities of his or her salespersons, including familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination. 10 Cal.Code Reg. § 2725(f). His failure to do so also bolsters the contention that he should be held personally liable for unlawful discriminatory acts of Triad's salespersons.

Although federal law governs the issue of agency under the FHA, the California licensing scheme is instructive here in discerning Meyer's supervision and control over Triad sales activity. California law provides that "[n]o acts for which a real estate license is required may be performed for, or in the name of, a corporation"

unless the corporation has designated an officer of the corporation to serve as the officer/broker of the company. Cal. Bus. & Prof.Code §§ 10158 & 10211; 10 Cal.Code Reg. § 2740. As a real estate salesperson for Triad, acting under the corporate license, Crank sold real estate under the supervision of the designated officer/broker. Cal. Bus. & Prof.Code § 10159.2(a). Technically, the licensed broker is the corporation, however, as designated broker, under California law, Meyer was personally responsible for this supervision.

The district court interpreted this to mean that Meyer could be personally liable only if Crank operated under a license that Meyer held in his personal capacity rather than as an officer of Triad. Based on the analysis and policy discussed above and the California real estate licensing requirements, we disagree. The designated officer/broker of a real estate corporation in California is responsible for the "supervision and control of the activities conducted on behalf of the corporation by its officers and employees . . . including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required." Cal. Bus. & Prof.Code § 10159.2(a).

The state regulations implementing these real estate licensing laws require that a broker exercise "reasonable supervision" over the activities of salespersons. The regulations define such reasonable supervision as including establishment of "policies, rules, procedures and systems to review, oversee, inspect and manage" transactions requiring a real estate license and familiarizing salespersons with the requirements of federal and state laws prohibiting discrimination. 10 Cal.Code Reg. § 2725.

Meyer does not dispute that he was the designated officer/broker of Triad at the time of the alleged discrimination. Meyer testified that he understood his responsibilities as designated officer/broker at Triad to include making sure that Triad's agents "were acting lawfully, that contracts were negotiated lawfully" and that people were treated lawfully.

Meyer's undisputed responsibility to supervise Triad's salespersons in real estate transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling. *See* 24 C.F.R. § 103.20 (1999). Meyer argues that this regulation is irrelevant here as it applies to administrative complaints rather than civil actions. The Supreme Court, however, has interpreted the statute authorizing an administrative proceeding and that authorizing the filing of a civil action as providing parallel remedies to the same prospective plaintiffs. *Gladstone*, 441 U.S. at 105-08, 99 S.Ct. 1601. The Court inferred the congressional intent to provide all victims of Title VIII violations two alternative mechanisms to "seek redress: immediate suit in federal district court or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail." *Id.* at 104, 99 S.Ct. 1601. This judicial interpretation of the two statutes renders the regulation for administrative complaints highly relevant to the instant civil action.

Although the federal courts have declined to allow state law to control rulings on agency for purposes of FHA violations, consideration of the state licensing

scheme is appropriate here to determine Meyer's involvement or omissions in the alleged discriminatory acts.[6] As both president and designated officer/broker of Triad, Meyer had a duty to prevent unlawful discrimination such as that which is alleged of Triad salesperson Crank. If Meyer breached that duty to supervise then he should be held accountable for such an omission even absent direct involvement or authorization of Crank's alleged discriminatory conduct.

We disagree with the district court's ruling that Meyer could only be liable here if Crank acted under the authority of a license Meyer held personally rather than as a corporate officer of Triad. His responsibilities as designated officer/broker under Triad's corporate license, by mandate of state law, required him to direct and control the conduct of Triad salespersons with respect to the sale of homes and the provision of brokerage services relating to the sale of homes. If Meyer was indeed an officer of the corporation and the designated officer/broker of Triad Realty at the time of the alleged conduct, it is difficult to see how he could be excused from the obligation imposed by the FHA to prohibit discrimination in the housing field.

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[6] Meyer argues that the California real estate licensing law is irrelevant here as California courts have interpreted it as extending a disciplinary scheme rather than creating a private right of action against a designated broker. Appellants here do not attempt to bring a private action under the California statute, rather they argue that the statute is relevant to determining Meyer's responsibilities of supervision in a claim brought under the FHA.

CONCLUSION

In light of the evidence that Meyer was (1) an officer of Triad Realty at the time of the alleged discriminatory acts; (2) the designated broker of the corporation who enabled it to engage in the business of selling real estate; and (3) the sole shareholder of the corporation at the time of the alleged discrimination, we disagree with the district court's conclusion that as a matter of law Meyer cannot be individually liable for damages resulting from the alleged FHA violations. Accordingly, we reverse and remand this case to the District Court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public Plaintiffs, v. DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., doing business as TRIAD REALTORS Defendant.	CV-98-7965-WMB ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS (Filed Mar. 17, 1999)

I. BACKGROUND

Emma Mary Ellen Holley, David Holley, Michael Holley ("Holleys") and Brooks Bauer ("Bauer") (collectively "plaintiffs") filed a complaint on November 14, 1997, alleging that Grove Crank Sr. ("Crank") and Triad Realtors ("Triad") (collectively "defendants") violated federal and state fair housing laws by discriminating against plaintiffs on the basis of their race during an attempt by the Holleys to purchase a house. Plaintiffs also sued David Meyer ("Meyer") in a separate action that nevertheless covered the same allegations and added several new claims. This Court has consolidated the two cases.

Plaintiffs allege that in October 1996, the Holleys visited the Twenty-Nine Palms office of Triad Realtors. There, they met with Triad agent Crank and inquired about listings for new houses in the $100,000 to $150,000 range. Crank took the Holleys to see 4 houses in the area, all of which were above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed with Triad. When the Holleys asked about that house, Ms. Terry Stump ("Stump") a Triad agent, informed them that the asking price for the house was $145,000.

The Holleys wished to make an offer to purchase the house at the listed price, but they wanted to wait until they closed escrow on their existing home. The Holleys indicated to Stump that they would put $5000 in escrow for the builder to hold the house until April or May 1997. Stump told the Holleys that their offer seemed fair. Mrs. Holley also called Bauer, the builder of the house, to tell him that they would offer to pay the listed price for the house, and pay $5000 to hold the house until their escrow closed. Bauer indicated that he thought it seemed fair, but told the Holleys that the offer must go through Triad.

Later, Stump called Mrs. Holley to tell her that other people in the Triad office felt that $5000 was not enough money to get the builder to hold the house for six months. The Holleys decided not to raise their offer, and Stump said that the offer would not be presented to the builder. Stump indicated that Crank and Lois Carroll were the agents in the office who determined that the offer was too low, and that as a newer agent, she had to follow their instructions. The Holleys told Stump that the builder should be able to decide if the offer was fair.

One week later, Bauer stopped by the Triad office to find out the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys and called them a "salt and pepper team." Bauer and the Holleys filed a complaint against Triad with the San Bernardino Fair Housing Council.

In November 1997, Plaintiffs also filed six claims against defendants in this Court: (1) violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604; (2) violation of 42 U.S.C. § 1982; (3) violation of the California Fair Employment and Housing Act, Cal. Gov. Code § 12955; (4) violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51; (5) unfair business practices in violation of Cal. Bus. & Prof. Code § 17200; and (6) negligence. In October 1998, the plaintiffs asserted four additional claims against Meyer: (1) breach of fiduciary duty to plaintiff Bauer; (2) tortious interference with economic relationship; (3) negligent interference with economic relationship; and (4) violation of the California statutory negligence provisions, Cal. Bus. & Prof. Code §§ 10177(h) & 10159.2.

Intervenor Legion Insurance Company, ("Legion") provided insurance coverage for defendants in the period covered by the allegations of this case. Legion filed a declaratory relief action in which the Holleys and Bauer intervened. The Court granted Legion's summary judgment motion and declared that the alleged acts by defendants were not covered by the insurance and Legion's liability was limited to a $10,000 duty to defend. Defendant Meyer then filed this motion to dismiss.

II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1887) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). On a motion to dismiss, the court must presume all factual allegations of the pleading to be true and draw all reasonable inferences in favor of the non-moving party. *Id.*

III. DISCUSSION

Meyer moves to dismiss on two individual grounds. First, he claims that as a designated broker who had no part in the discriminatory acts, he cannot be found personally liable. Second, because the complaint was filed in October 1998, Meyer alleges that the statute of limitations bars many of the claims against him.

A. MEYER'S PERSONAL LIABILITY

1. State Claims

Plaintiffs' state that they have not sued Meyer in his individual capacity for violation of state law, although their complaint does not exactly bear this out.[1] Plaintiffs

[1] In their complaint, plaintiffs state that they are suing Meyer in his individual capacity for all claims except for three. Pls' complaint ¶ 6. However, all but two claims are premised on state law violations. In the hearing on February 2, 1999, this

admit that under California law Meyer "cannot be held individually liable unless he participated in the subject transaction." Pls' opp. at 6. Because plaintiffs do not allege that Meyer had anything to do with the actions described in the complaint, Meyer, as a broker, is not individually liable for any state law violations.

California law is very clear that "[a]ny action by the qualifying broker [of a real estate brokerage firm] must be regarded as an action by the corporation and not by the broker as an individual." *Walters v. Marler*, 83 Cal.App.3d 1, 35 (1978). Furthermore, a qualifying broker "may not be held personally liable" for an action of an employee. *See id.*

Plaintiffs call into question the ruling in *Walters* because a year after that court issued its opinion, the California Legislature passed a statute that requires a designated broker to "supervise and control the activities of the sales persons employed by the corporation." Cal. Bus. & Prof. Code § 10159.2. This statute is part of the statutory regulation of real estate brokers that contains sections on licensing requirements and penalties for violations of the regulatory scheme. *See* Cal. Bus. & Prof. Code §§ 10130, 10175-10185. In light of the detailed disciplinary sanctions imposed by §§ 10175-10185, a federal

Court inquired of plaintiffs' counsel whether Meyer was being sued in his individual capacity for violations of California law. Plaintiffs' counsel at that point reiterated the fact that Meyer was not being sued individually for any California law violation. Therefore, this court considers the eight claims premised on California law violations to be directed at Meyer in his role as officer of Triad only.

district court ruled that § 10159.2 does not create a private right of action against a designated broker. *See In re Grabau*, 151 B.R. 227, 232 (N.D.Cal. 1993). The court noted that "[t]he most obvious interpretation of § 10159.2 is that it simply extended [the] disciplinary scheme to apply against designated brokers who failed to properly supervise employees." *Id.*

As far as the allegations against Meyer in his role as officer of Triad are concerned, these claims should be properly asserted against Triad. Triad is not party to this specific case. Furthermore, any liability against Meyer as an officer of Triad would only attach to Triad in that plaintiffs have not urged theories that could justify reaching Meyer individually. Therefore, all state claims against Meyer as an officer of Triad are dismissed.[2]

2. Federal Claims

Though plaintiffs do not contend that Meyer is individually liable for his alleged state law violations, they do seek to find him liable individually both as an officer and designated broker of Triad for the alleged violations of federal law.

The doctrine of respondeat superior applies to actions brought under 42 U.S.C. § 1982 and FHA. *See City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096 (7th Cir. 1992). Principals have been held

[2] Plaintiffs' claims for violation of the Unruh act and for negligence would also be dismissed for being outside the statute of limitations of one year.

liable for the discriminatory actions of their agents in the context of FHA. *See United States v. Ralistrieri*, 981 F.2d 916, 930 (7th Cir. 1992). In most cases where liability is imposed on the principal for the discriminatory acts of an agent, the principal does not need to authorize or know of the discriminatory activity for liability to attach. *See id.*, 981 F.2d at 916. However, the overwhelming majority of these cases takes place in a situation where the principal personally owns the involved real property, as distinguished from the situation where the principal owns a corporation that in turn owns the real property. *See e.g. Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992); *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975).

As to Meyer's liability for federal violations in his capacity as officer of Triad, these claims should be asserted against Triad which is not party to this specific case. Furthermore, any liability against Meyer as an officer of Triad would only attach to Triad in that plaintiffs have not urged theories that could justify reaching Meyer individually.

Plaintiffs also allege that Meyer is individually liable as a designated broker. Pls' complaint ¶ 6. Although no specific act of discrimination by Meyer is alleged, this factual allegation is not necessary for his individual liability as a designated broker under the federal claims. A licensed broker under whose license employees operate may be liable for the discriminatory actions of those employees. *See Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232, 1303 (N.D. Ohio 1983), *rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985). In *Hilltop* the court deemed that the licensed broker, in that case a

corporation, was "liable for the imputed acts and statements" of those agents operating under the license who participated in violations of the federal housing laws. *See id.* The plaintiffs also sought to attach liability to the owner/president of the corporation. *See id.* The court held that since the agents that committed the discriminatory acts had a "contractual relationship with [the corporation] as broker and not with [the owner/president] as broker, [the agents'] acts and statements [could] not be imputed to [the owner/president.]" *See id.*[3]

Similarly, in *United States v. Lorantffy Care Center*, 999 F.Supp. 1037, 1045 (N.D. Ohio 1998), the U.S. government was seeking to find employees personally liable for the pattern and practice of discrimination allegedly perpetrated by a care center for the elderly. The court noted that there is a right to challenge the "illegal activities of a group of persons even if the individual members" were not engaged in any illegal activity. *See id.* "However, that right is limited. In particular, no individual may be held vicariously liable simply because she is an officer or manager of the company." *Id.* Thus, where the designated broker is a company, the liability attaches to the company

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[3] The court also explained why the owner could not be liable through the piercing of the corporate veil doctrine. "[V]icarious liability may not be imposed on [the owner] because of his other roles at [the corporation] . . . [s]ince he is not the sole owner of the company, his partial stock ownership would not permit a per se piercing of the corporate veil." *Hilltop Realty*, 629 F.Supp. at 1304. The court noted that the owner's status "as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees" absent a personal participation in the prohibited conduct. *See id.*

and not to the officers of the company who did not engage in discriminatory conduct. *Id.* Therefore, here if plaintiffs establish that a discriminatory act took place by an agent who operated under a broker's license held by Meyer as an individual and not as an officer, they could recover against Meyer individually.

In sum, the Court dismisses Meyer as an officer for all federal and state claims. The Court also dismisses Meyer as an individual from all claims except Claims One and Two which are premised on his being a designated broker.

With respect to Meyer's liability as an individual for violations of federal law the Court needs to address defendant's statute of limitations claim.

B. STATUTE OF LIMITATIONS ANALYSIS

The alleged episodes of discrimination occurred in November 1996. Plaintiffs state that they discovered the alleged discrimination in April 1997. Plaintiffs initiated the action against Meyer in October 1998. Thus a statute of limitations of one year on any particular claim would preclude plaintiffs from asserting that claim against Meyer. Likewise, any claim with a limitations period of two or more years would mean that plaintiffs were within the time period allowed for the bringing of the action against Meyer.

As to the federal claims, defendant only raises the time-barred defense with respect to 42 U.S.C. § 1982 contending that a one year limitation applies. The limitations period begins to run from the "date of the last act."

See Havens Realty Corporation v. Coleman, 455 U.S. 363, 380-81 (1982). Accordingly the limitations period began to run in November 1996 (the latest date of the alleged discrimination).

Plaintiffs attempt to skirt the whole limitations period issue by saying that because Meyer's violation continued until August 1998, the date he ceased being Triad's designated broker, plaintiffs are within a one year limit should this be the applicable period. This argument fails. Plaintiffs point to a line of cases which state that the limitations period only accrues from the date of the last act in cases involving a "pattern" of discrimination. *See Coleman*, 455 U.S. at 380-81.

Plaintiffs attempt to analogize *Coleman* with the facts of this case. However, in *Coleman* there were specific allegations of different instances of discriminatory episodes. *See Coleman*, 455 U.S. at 366. Here, there are no such allegations leveled at Meyer. Plaintiffs' statement that "Meyer continues to engage in grossly negligent conduct by abdicating all responsibility for Triad Realtors" does not rise to the level of a pattern of discrimination. Plaintiffs point to no other allegations of discriminatory conduct by Meyer's subordinates and a mere omission to supervise one employee at one time is not akin to specific episodes of active discrimination. Thus the statute of limitations accrued in November 1996 for the federal claims.

Defendant states that the limitations period for violation of 42 U.S.C. § 1982 is one year. Defendant reaches this conclusion by analogizing a § 1982 claim to a § 1983 claim. The Supreme Court has ruled that § 1983 claims

are governed by the most applicable state statute of limitations period. *See Wilson v. Garcia*, 471 U.S. 261 (1985). Defendant contends that the closest applicable state limitations statute is the California personal injury statute (California Code of Civil Procedure § 340) of one year and therefore this should apply. Plaintiffs' only argument with respect to this claim rests with the "continuing violation" period outlined and rejected above.

One court has held that a one year statute of limitations applies to actions filed under 42 U.S.C. § 1982. *See Mitchell v. Sung*, 816 F.Supp. 597 (N.D.Cal. 1993). In that case, the court determined that § 1982 is akin to §§ 1981 and 1983 because all of this statutory section was part of the same package of rights. *See Mitchell*, 816 F.Supp at 601. Thus, because the Supreme Court had already indicated that §§ 1981 and 1983 were to be governed by state limitations periods for personal injury suits and that relevant period in California is one year, § 1982 claims also carry the same limitations period. *Id.* This Court agrees.

Because the limitations period against Meyer has already expired the Court GRANTS defendant's motion to dismiss Meyer as an individual with respect to the § 1982 claim.

IV. CONCLUSION

For the foregoing reasons the Court: (1) GRANTS defendant's motion to dismiss Claims Two through Ten in their entirety; (2) GRANTS defendant's motion to dismiss Meyer as an officer of Triad in Claim One; and (3)

DENIES defendant's motion to dismiss Meyer as a designated broker in Claim One.

Date: March 15, 1999

/s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne Jr.
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EMMA MARY ELLEN HOLLEY, et. al., Plaintiffs, v. DAVID MEYER, individually and in his capacity as President and designated officer/broker of TRIAD INC., dba TRIAD REALTORS, Defendant.	CV 98-7965-WMB ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed July 26, 1999)

I. BACKGROUND

Emma Mary Ellen Holley, David Holley, Michael Holley ("Holleys") and Brooks Bauer ("Bauer") (collectively "plaintiffs") filed a complaint on November 14, 1997, alleging that Grove Crank Sr. ("Crank") and Triad, Inc, (a California real estate corporation) violated federal and state fair housing laws by discriminating against plaintiffs on the basis of their race during an attempt by the Holleys to purchase a house. Plaintiffs also sued David Meyer ("Meyer") in a separate action that covered the same allegations and added several new claims. The two cases have been consolidated.

Plaintiffs allege that in October 1996, the Holleys visited the Twenty-Nine Palms office of Triad, Inc. There, they met with Triad, Inc. agent Crank and inquired about

listings for new houses in the $100,000 to $150,000 range. Crank took the Holleys to see four houses in the area, all of which were above $150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed with Triad, Inc. When the Holleys asked about that house, Ms. Terry Stump ("Stump") a Triad, Inc. agent, informed them that the asking price for the house was $145,000.

The Holleys wished to make an offer to purchase that house at the listed price, but they wanted to wait until they closed escrow on their existing home. The Holleys indicated to Stump that they would put $5000 in escrow for the seller to hold the house until April or May 1997. Stump told the Holleys that their offer seemed fair. Mrs. Holley called Bauer, the seller of the house, to tell him that they would offer to pay the listed price for the house, and pay $5000 to hold the house until their escrow closed. Bauer indicated that he thought it seemed fair, but told the Holleys that the offer must go through Triad, Inc.

Later, Stump called Mr. Holley to tell her that other people in the Triad, Inc. office felt that $5000 was not enough money to get the seller to hold the house for six months. The Holleys decided not to raise their offer, and Stump said that the offer would not be presented to Bauer. Stump indicated that Crank and Lois Carroll were the agents in the office who determined that the offer was too low, and that as a newer agent, she had to follow their instructions. The Holleys told Stump that Bauer should be able to decide if the offer was fair.

One week later, Bauer stopped by the Triad, Inc. office to find out the status of the Holleys' offer. Crank

then allegedly used racial statements in referring to the Holleys and called them a "salt and pepper team." Mrs. Holley is African American while her husband is white. Bauer and the Holleys filed a complaint against Triad, Inc. with the San Bernardino Fair Housing Council.

In November 1997, Plaintiffs filed this action alleging six claims against defendants: (1) violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3604; (2) violation of 42 U.S.C. § 1982; (3) violation of the California Fair Employment and Housing Act, Cal. Gov. Code § 12955; (4) violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51; (5) unfair business practices in violation of Cal. Bus. & Prof. Code § 17200; and (6) negligence. In October 1998, the plaintiffs then filed the case against Meyer alleging the earlier claims and adding four additional claims: (1) breach of fiduciary duty to plaintiff Bauer; (2) tortious interference with economic relationship; (3) negligent interference with economic relationship; and (4) violation of the California statutory negligence provisions, Cal. Bus. & Prof. Code §§ 10177(h) & 10159.2.

Intervenor Legion Insurance Company, ("Legion") provided insurance coverage for Triad, Inc. in the period covered by the allegations of this case. Legion filed a declaratory relief action in which the Holleys and Bauer intervened. The Court granted Legion's summary judgment motion and declared that the acts by plaintiffs were not covered by the insurance and Legion's liability was limited to a $10,000 duty to defend.

Defendant Meyer then filed a motion to dismiss. On March 17, 1999, this Court granted Meyer's motion for all eight state claims and for plaintiffs' federal claim based

on the violation of 42 U.SC. § 1982. This Court denied Meyer's motion with respect to the federal claim based on the violation of FHA on the grounds that "if plaintiffs establish that a discriminatory act took place by an agent who operated under a broker's license held by Meyer as an individual and not as an officer, they could recover against Meyer individually." *See* Order Granting in Part and Denying in Part, Def's Motion to Dismiss, at 9. Meyer now moves for summary judgment on the one remaining federal claim.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The moving party for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of fact for trial. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). When the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact would find other than for the moving party. On an issue for which

the nonmoving party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party satisfies its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed R. Civ. Proc. 56(e). If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323.

III. DISCUSSION

A licensed broker under whose license employees operate may be liable for the discriminatory actions of those employees. *See Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232, 1303 (N.D. Ohio 1983), *rev'd in part on other grounds*, 774 F.2d 135 (6th Cir. 1985). In *Hilltop* the court deemed that the licensed broker, in that case a corporation, was "liable for the imputed acts and statements" of those agents operating under the corporation's license who participated in violations of the federal housing laws. *See id.* The plaintiffs also sought to attach liability to the owner/president of the corporation. *See id.* The court held that since the agents that committed the discriminatory acts had a "contractual relationship with [the corporation] as broker and not with [the owner/president] as broker, [the agents'] acts and

statements [could] not be imputed to [the owner/ president.]" *See id.*[1]

Similarly, in *United States v. Lorantffy Care Center*, 999 F.Supp. 1037, 1045 (N.D. Ohio 1998), the government was seeking to hold employees personally liable for the pattern and practice of discrimination allegedly perpetrated by a care center for the elderly. The court noted that there is a right to challenge the "illegal activities of a group of persons even if the individual members" were not engaged in any illegal activity. *See id.* "However, that right is limited. In particular, no individual may be held vicariously liable simply because she is an officer or manager of the company." *Id.*

Thus, where the license is held by a corporation, the liability attaches to the corporation and not to the officers of the corporation who did not engage in discriminatory conduct. Therefore, the sole issue in this summary judgment motion is whether Meyer, holds his broker's license as an individual or as an officer of Triad, Inc.

In opposing defendant's motion for summary judgment, plaintiffs seem to pay little attention to the

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[1] The court also explained why the owner could not be liable through the piercing of the corporate veil doctrine. "[V]icarious liability may not be imposed on [the owner] because of his other roles at [the corporation] . . . [s]ince he is not the sole owner of the company, his partial stock ownership would not permit a per se piercing of the corporate veil." *Hilltop Realty*, 629 F.Supp. at 1304. The court noted that the owner's status "as president and chief operating officer in and of itself does not render him personally liable for acts of the corporation or its agents or employees" absent a personal participation in the prohibited conduct. *See id.*

Court's framing of the issue concerning the status of Meyer's license. Rather, plaintiffs focus on attempting to argue that the Court misread the law regarding personal liability of principals for the unlawful acts of their agents under FHA.[2] Plaintiffs' arguments have already been addressed and rejected in this Court's previous order and need not be repeated here.

In California, both corporations and individuals have to be licensed to operate as real estate brokers. *See* Cal. Bus. & Prof. Code § 10006. If the licensee is a corporation,

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[2] In his reply brief, defendant correctly points out that instead of addressing the issue pertinent to this summary judgment motion, plaintiffs have framed their arguments in a way that looks like a motion for reconsideration of the Court's order denying in part and granting in part Meyer's motion to dismiss. *See* Def's Reply at 2. Under Central District of California Local Rule 7.16, a motion for reconsideration is only proper in the following circumstances: (1) if there is a material difference in fact or law from that presented to the Court before such decision that, in the exercise of reasonable diligence, could not have been known to the party moving for reconsideration at the time of such decision; or (2) if new material facts emerge or a change of law occurs after the time of such decision; or (3) if there is a manifest showing of a failure to consider material facts presented to the Court before such a decision. A motion for reconsideration shall not in any manner repeat any arguments that were presented in the original motion or opposition. *See Guthy-Renker Fitness, L.L.C. v. Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 275 (C.D.Cal. 1998). A motion for reconsideration cannot be based on evidence that could reasonably have been discovered prior to the court's ruling. *See Hopkins v. Andaya*, 958 F.2d 881, 887 n.5 (9th Cir. 1992). As discussed in the main portion of the text, plaintiffs have presented no scenario under which this Court should reconsider its ruling in Meyer's motion to dismiss.

the license entitles one officer from the corporation to act as a real estate broker for the corporation and he must be designated as such on the license. *See* Cal. Bus. & Prof. Code § 10211. "Each officer of a corporation through whom it is licensed to act as a real estate broker is, while so employed under such license, a licensed real estate broker, but licensed only to act as such for and on behalf of the corporation as an officer." *See* Cal. Bus. & Prof. Code § 10159.

During the time relevant to this case, the real estate license was issued to Triad, Inc. with Meyer as the designated corporate officer of Triad, Inc. Crank was employed by and licensed as a salesperson for Triad, Inc. Therefore, because Triad, Inc. was the licensed broker, Crank's contractual relationship was with Triad, Inc. and not with Meyer. *See Hilltop*, 629 F.Supp. at 1303. Thus, Crank's discriminatory acts are imputed to Triad, Inc. and not to Meyer as an individual. Hence Meyer cannot be held personally liable for Crank's alleged misconduct.

IV. CONCLUSION

For the foregoing reasons, defendant Meyer's motion for summary judgment is GRANTED.

DATE: July 26, 1999

/s/ Wm. Matthew Byrne, Jr.
Wm. Matthew Byrne, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Plaintiffs-Appellants,

v.

GROVE S. CRANK, SR., individually, dba Triad Realtors; TRIAD INC., individually, dba Triad Realtors

Defendants

and

DAVID MEYER, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors,

Defendant-Appellee.

No. 99-56611

D.C. No. CV-98-07965-WMB-SHX; CV-97-08368-WMB-SHX

ORDER

(Filed Oct. 4, 2001)

Before: HUG, Circuit Judge.

Appellee's motion for stay of the issuance of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(d). The mandate is stayed for ninety (90) days from the date this order is filed. If,

within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, then the mandate shall be further stayed until final disposition of the matter by the Supreme Court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMMA MARY ELLEN HOLLEY; DAVID HOLLEY; MICHAEL HOLLEY, a minor; BROOKS BAUER, individually and on behalf of the general public,

Plaintiffs-Appellants,

v.

GROVE S. CRANK, SR., individually, dba Triad Realtors; TRIAD INC., individually, dba Triad Realtors

Defendants

and

DAVID MEYER, individually and in his capacity as President and designated officer/broker of Triad, Inc., dba Triad Realtors,

Defendant-Appellee.

No. 99-56611

D.C. No. CV-98-07965-WMB-SHX; CV-97-08368-WMB-SHX

ORDER

(Filed Sept. 19, 2001)

Before: HUG, and B. FLETCHER, Circuit Judges, and ILLSTON, District Judge.*

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* Honorable Susan Y. Illston, United States District Judge for the Northern District of California, sitting by designation.

The panel has voted to deny Appellee's petition for rehearing. Judge Hug has voted to deny the suggestion for rehearing en banc, and Judges Fletcher and Illston so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and suggestion for rehearing en banc are denied.

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42 USCA § 3610

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

(ii) Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires.

(iii) The Secretary may also investigate housing practices to determine whether a complaint should be brought under this section.

(B) Upon the filing of such a complaint –

(i) the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this subchapter;

(ii) the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under this subchapter, together with a copy of the original complaint; (iii) each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and

(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), unless it is impracticable to do so.

(C) If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so. (D) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

(2)(A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under paragraph (1), to such person, from the Secretary.

(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secretary's belief that the person to whom the notice is addressed is properly joined as a respondent.

(b) Investigative report and conciliation

(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the

extent feasible, engage in conciliation with respect to such complaint.

(2) A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the complainant, and shall be subject to approval by the Secretary.

(3) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. Any such arbitration that results from a conciliation agreement may award appropriate relief, including monetary relief.

(4) Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this subchapter.

(5)(A) At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing –

(i) the names and dates of contacts with witnesses;

(ii) a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent;

(iii) a summary description of other pertinent records;

(iv) a summary of witness statements; and

(v) answers to interrogatories.

(B) A final report under this paragraph may be amended if additional evidence is later discovered.

(c) Failure to comply with conciliation agreement

Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 3614 of this title for the enforcement of such agreement.

(d) Prohibitions and requirements with respect to disclosure of information

(1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

(2) Notwithstanding paragraph (1), the Secretary shall make available to the aggrieved person and the respondent, at any time, upon request following completion of the Secretary's investigation, information derived from an investigation and any final investigative report relating to that investigation.

(e) Prompt judicial action

(1) If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this subchapter, the Secretary may authorize a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint under this section. Upon receipt of such an authorization, the Attorney General shall promptly commence and maintain such an action. Any temporary

restraining order or other order granting preliminary or temporary relief shall be issued in accordance with the Federal Rules of Civil Procedure. The commencement of a civil action under this subsection does not affect the initiation or continuation of administrative proceedings under this section and section 3612 of this title.

(2) Whenever the Secretary has reason to believe that a basis may exist for the commencement of proceedings against any respondent under sections 3614(a) and 3614(c) of this title or for proceedings by any governmental licensing or supervisory authorities, the Secretary shall transmit the information upon which such belief is based to the Attorney General, or to such authorities, as the case may be.

(f) Referral for State or local proceedings

(1) Whenever a complaint alleges a discriminatory housing practice –

(A) within the jurisdiction of a State or local public agency; and

(B) as to which such agency has been certified by the Secretary under this subsection; the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

(2) Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless –

(A) the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral;

(B) the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or

(C) the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.

(3)(A) The Secretary may certify an agency under this subsection only if the Secretary determines that –

(i) the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made;

(ii) the procedures followed by such agency;

(iii) the remedies available to such agency; and

(iv) the availability of judicial review of such agency's action; are substantially equivalent to those created by and under this subchapter.

(B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

(4) During the period which begins on September 13, 1988, and ends 40 months after September 13, 1988, each agency certified (including an agency certified for interim referrals pursuant to 24 CFR 115.11, unless such agency is subsequently denied recognition under 24 CFR 115.7) for the purposes of this subchapter on the day before September 13, 1988 shall for the purposes of this subsection be considered certified under this subsection with respect to those matters for which such agency was certified on September 13, 1988. If the Secretary determines in an individual case that an agency has not been able to meet

the certification requirements within this 40-month period due to exceptional circumstances, such as the infrequency of legislative sessions in that jurisdiction, the Secretary may extend such period by not more than 8 months.

(5) Not less frequently than every 5 years, the Secretary shall determine whether each agency certified under this subsection continues to qualify for certification. The Secretary shall take appropriate action with respect to any agency not so qualifying.

(g) Reasonable cause determination and effect

(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) of this section with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.
(2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice

has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 3612 of this title.

(B) Such charge –

(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(ii) shall be based on the final investigative report; and

(iii) need not be limited to the facts or grounds alleged in the complaint filed under subsection (a) of this section.

(C) If the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 3614 of this title, instead of issuing such charge.

(3) If the Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall promptly dismiss the complaint. The Secretary shall make public disclosure of each such dismissal.

(4) The Secretary may not issue a charge under this section regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

(h) Service of copies of charge

After the Secretary issues a charge under this section, the Secretary shall cause a copy thereof, together with information as to how to make an election under section 3612(a) of this title and the effect of such an election, to be served –

(1) on each respondent named in such charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless that election is made; and

(2) on each aggrieved person on whose behalf the complaint was filed.

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42 USCA § 3612

a) Election of judicial determination

When a charge is filed under section 3610 of this title, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) of this section in lieu of a hearing under subsection (b) of this section. The election must be made not later than 20 days after the receipt by the electing person of service under section 3610(h) of this title or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

(b) Administrative law judge hearing in absence of election

If an election is not made under subsection (a) of this section with respect to a charge filed under section 3610 of this title, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 3610 of this title. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of Title 5. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

(c) Rights of parties

At a hearing under this section, each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 3611 of this title. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

(d) Expedited discovery and hearing

(1) Discovery in administrative proceedings under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the need of all parties to obtain relevant evidence.

(2) A hearing under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the needs and rights of the parties to obtain a fair hearing and a complete record.

(3) The Secretary shall, not later than 180 days after September 13, 1988, issue rules to implement this subsection.

(e) Resolution of charge

Any resolution of a charge before a final order under this section shall require the consent of the aggrieved person on whose behalf the charge is issued.

(f) Effect of trial of civil action on administrative proceedings

An administrative law judge may not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

(g) Hearings, findings and conclusions, and order

(1) The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance

of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(2) The administrative law judge shall make findings of fact and conclusions of law within 60 days after the end of the hearing under this section, unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within such period, or any succeeding 60-day period thereafter, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent –

(A) in an amount not exceeding $10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

(B) in an amount not exceeding $25,000 if the respondent has been adjudged to have committed one other discriminatory housing practice during the 5-year period ending on the date of the filing of this charge; and

(C) in an amount not exceeding $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory housing practices during the 7-year period ending on the date of the filing of this charge; except that if the acts constituting the discriminatory housing practice that is the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in subparagraphs (B) and (C) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

(4) No such order shall affect any contract, sale, encumbrance, or lease consummated before the issuance of such order and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the charge filed under this subchapter.

(5) In the case of an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a governmental agency, the Secretary shall, not later than 30 days after the date of the issuance of such order (or, if such order is judicially reviewed, 30 days after such order is in substance affirmed upon such review) –

(A) send copies of the findings of fact, conclusions of law, and the order, to that governmental agency; and

(B) recommend to that governmental agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent).

(6) In the case of an order against a respondent against whom another order was issued within the preceding 5 years under this section, the Secretary shall send a copy of each such order to the Attorney General.

(7) If the administrative law judge finds that the respondent has not engaged or is not about to engage in a discriminatory housing practice, as the case may be, such administrative law judge shall enter an order dismissing the charge. The Secretary shall make public disclosure of each such dismissal.

(h) Review by Secretary; service of final order

(1) The Secretary may review any finding, conclusion, or order issued under subsection (g) of this section. Such review shall be completed not later than 30 days after the finding, conclusion, or order is so issued; otherwise the finding, conclusion, or order becomes final.

(2) The Secretary shall cause the findings of fact and conclusions of law made with respect to any final order for relief under this section, together with a copy of such order, to be served on each aggrieved person and each respondent in the proceeding.

(i) Judicial review

(1) Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain a review of such order under chapter 158 of Title 28.

(2) Notwithstanding such chapter, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred, and filing of the petition for review shall be not later than 30 days after the order is entered.

(j) Court enforcement of administrative order upon petition by Secretary

(1) The Secretary may petition any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business for the enforcement of the order of the administrative law judge and for appropriate temporary relief or restraining order, by filing in such court a written petition praying that such order be enforced and for appropriate temporary relief or restraining order.

(2) The Secretary shall file in court with the petition the record in the proceeding. A copy of such petition shall be forthwith transmitted by the clerk of the court to the parties to the proceeding before the administrative law judge.

(k) Relief which may be granted

(1) Upon the filing of a petition under subsection (i) or (j) of this section, the court may –

(A) grant to the petitioner, or any other party, such temporary relief, restraining order, or other order as the court deems just and proper;

(B) affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and

(C) enforce such order to the extent that such order is affirmed or modified.

(2) Any party to the proceeding before the administrative law judge may intervene in the court of appeals.

(3) No objection not made before the administrative law judge shall be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(l) Enforcement decree in absence of petition for review

If no petition for review is filed under subsection (i) of this section before the expiration of 45 days after the date the administrative law judge's order is entered, the administrative law judge's findings of fact and order shall be conclusive in connection with any petition for enforcement –

(1) which is filed by the Secretary under subsection (j) of this section after the end of such day; or (2) under subsection (m) of this section.

(m) Court enforcement of administrative order upon petition of any person entitled to relief

If before the expiration of 60 days after the date the administrative law judge's order is entered, no petition for review has been filed under subsection (i) of this section, and the Secretary has not sought enforcement of the order under subsection (j) of this section, any person

entitled to relief under the order may petition for a decree enforcing the order in the United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred.

(n) Entry of decree

The clerk of the court of appeals in which a petition for enforcement is filed under subsection (l) or (m) of this section shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary, the respondent named in the petition, and to any other parties to the proceeding before the administrative law judge.

(o) Civil action for enforcement when election is made for such civil action

(1) If an election is made under subsection (a) of this section, the Secretary shall authorize, and not later than 30 days after the election is made the Attorney General shall commence and maintain, a civil action on behalf of the aggrieved person in a United States district court seeking relief under this subsection. Venue for such civil action shall be determined under chapter 87 of Title 28.

(2) Any aggrieved person with respect to the issues to be determined in a civil action under this subsection may intervene as of right in that civil action.

(3) In a civil action under this subsection, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant as relief any relief which a court could grant with respect to such

discriminatory housing practice in a civil action under section 3613 of this title. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under section 3613 of this title shall also accrue to that aggrieved person in a civil action under this subsection. If monetary relief is sought for the benefit of an aggrieved person who does not intervene in the civil action, the court shall not award such relief if that aggrieved person has not complied with discovery orders entered by the court.

(p) Attorney's fees

In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under this section, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section, 504 of Title 5 or by section 2412 of Title 28.

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42 USCA § 3613

a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing

practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

(b) Appointment of attorney by court

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may –

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals

Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

(e) Intervention by Attorney General

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 3614(e) of this title in a civil action to which such section applies.

(1999)

24 C.F.R. § 103.10 Submission of information.

(a) The Assistant Secretary will receive information concerning alleged discriminatory housing practices from any person. Where the information constitutes a complaint within the meaning of the Fair Housing Act and this part and is furnished by an aggrieved person, it will be considered to be filed under § 103.40. Where additional information is required for purposes of perfecting a complaint under the Fair Housing Act, HUD will advise what additional information is needed and will provide appropriate assistance in the filing of the complaint.

(b) HUD may also concurrently initiate compliance reviews under other appropriate civil rights authorities, such as E.O. 11063 on Equal Opportunity in Housing, title VI of the Civil Rights Act of 1964, section 109 of the Housing and Community Development Act of 1974, section 504 of the Rehabilitation Act of 1973 or the Age Discrimination Act (42 U.S.C. 6101). The information may also be made available to any other Federal, State or local agency having an interest in the matter. In making available such information, steps will be taken to protect the confidentiality of any informant or complainant where desired by the informant or complainant.

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24 C.F.R. § 103.15 Who may file complaints.

Any aggrieved person or the Assistant Secretary may file a complaint no later than one year after an alleged discriminatory housing practice has occurred or terminated. The complaint may be filed with the assistance of an authorized representative of an aggrieved person, including any organization acting on behalf of an aggrieved person.

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24 C.F.R. § 103.20 Persons against whom complaints may be filed.

(a) A complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage, in a discriminatory housing practice.

(b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

(2000)

24 C.F.R. § 103.10 What can I do if I believe someone is discriminating against me in the sale, rental, finance, or advertisement of housing?

You can notify HUD if you believe there has been discrimination against you in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household.

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24 C.F.R. § 103.15 Can I file a claim if the discrimination has not yet occurred?

Yes, you may file a claim with HUD if you have knowledge that a discriminatory action is about to occur.

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24 C.F.R. § 103.20 Can someone help me with filing a claim?

HUD's Office of Fair Housing and Equal Opportunity can help you in filing a claim, if you contact them directly. You, or anyone who acts for you, may also ask any HUD office or an organization, individual, or attorney to help you.